IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 78-1865

DONALD LEE MCCABE, D.O., *Petitioner*

v.

GALE GREENBERG, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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TO THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner, Donald Lee McCabe, D.O., prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The Opinion of Chief Judge Joseph S. Lord, III, denying Petitioner's Motion for Judgment Notwithstanding the Verdict or for a New Trial is reported at 453 F. Supp. 765 (E.D.Pa. 1978) and is Appendix A to this Petition. The per curiam judgment order of February 27, 1979 affirming the Lower Court decision is Appendix B. The Opinion Sur Denial of the Petition for Rehearing before the original panel was filed on March 21, 1979 and is Appendix C.

JURISDICTION

Jurisdiction below was based on the diversity of citizenship under 28 U.S.C. §1332. The jurisdiction of this court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Did the United States District Court for the Eastern District of Pennsylvania err in instructing the jury to consider the plaintiff's allegedly mentally disabled condition in determining when the statute of limitations began to run, despite the Pennsylvania law to the contrary?

2. Was the decision of the United States Court of Appeals for the Third Circuit in *Bayless v. Philadelphia National League Baseball Club*,[1] which was relied on by the Court below a violation of the principles set forth in *Erie Railroad Co. v. Tompkins*,[2] in that it predicted the law of Pennsylvania despite clear statements by Pennsylvania's highest court as to the applicable law?

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1. 579 F.2d 37 (3d Cir. 1978)
2. 304 U.S. 64 (1938).

STATEMENT OF THE CASE

This is a case alleging medical malpractice. The matter was tried before a jury in the District Court for the Eastern District of Pennsylvania. Defendant (Petitioner herein) maintained throughout the trial that the statute of limitations barred this cause. The trial court submitted a set of written interrogatories to the jury pursuant to F.R.C.P. 49. One interrogatory required the jury to consider the plaintiff's mental and physical condition in determining when the statute of limitations began to run despite the Pennsylvania law to the contrary. Defendant timely and properly objected to this interrogatory. The jury then returned a verdict for the plaintiff in the amount of $665,000.

Defendant then moved for a judgment N.O.V. or in the alternative a new trial. The Court denied those motions but remitted the $90,000 in damages awarded by the jury for future psychiatric care.

Both parties appealed the decision. The Court of Appeals for the Third Circuit affirmed by judgment order on February 27, 1979. Defendant filed a timely petition for rehearing before the original panel on March 12, 1979. On March 21, 1979 the court filed its opinion sur denial of the petition for rehearing. In that opinion the court maintained that the proper Pennsylvania statute of limitations should be the one announced in *Bayless v. Philadelphia National League Baseball Club*, 579 F.2d 237 (3d Cir. 1978) despite contrary holdings by Pennsylvania courts.

The defendant now petitions this Court for a Writ of Certiorari to review the decision below.

REASONS FOR ALLOWING THE WRIT

I. The ruling below violates the Rules Enabling Act and allows a district court to use a Federal Rule of Civil Procedure to usurp state law and thereby exceed the exercise of jurisdiction by the federal courts in diversity cases.

The framing of an interrogatory under Federal Rule of Civil Procedure 49 which in its substance does not conform to the law of the forum state, exceeds the bounds of the jurisdiction of a federal court in a diversity case.

The Rules Enabling Act, 28 U.S.C. §2072, provides in pertinent part:

> The Supreme Court shall have the power to prescribe by general rules the forms of process, writs, pleadings and motions and the practice and procedure of the district courts and courts of appeals of the United States in civil actions including admiralty and maritime cases and appeals therein . . . Such rules shall not abridge, enlarge or modify any substantive right. . . .

To pose an interrogatory[3] albeit under procedure governed by the Federal Rules of Civil Procedure, which enlarges the substantive rights of a plaintiff not only violates the Rules Enabling Act, *supra*, but directly contravenes the well-settled principles which govern the exercise of federal jurisdiction and its relation to state substantive law.

In *Erie Railroad Company v. Tompkins*, 304 U.S. 64 (1938), this Court faced the question of what law was to be applied by a federal court in a diversity case.

3. Interrogatory No. 9 — "Do you find that a person in Mrs. Greenberg's mental and physical condition (as you find it to have been) knew or should have known before January 5, 1974 that she was suffering harm as a result of the defendant's conduct?"

In interpreting the Rules of Decision Act (28 U.S.C. §1652) the Court held that:

> Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the state.

304 U.S. 74 at 78.

Applying *Erie* this Court has held that a federal court sitting in a diversity case must apply the state statute of limitations. *Guaranty Trust Company v. York*, 326 U.S. 99 (1944).

In so holding, the Court developed the "outcome-determinative test" for determining which law to apply:

> In essence, the intent of that decision [Erie] was to insure that in all cases where a federal court is exercising jurisdiction solely because of diversity of citizenship of the parties, the outcome of the litigation in the federal court should be substantially the same so far as legal rules determine the outcome of litigation as it would be if tried in a state court.

326 U.S. at 109.

The Pennsyvlania statute of limitations applicable to this action is the two year limit mandated by 12 Pa. Stat. Ann. (Purdon) §34.[4]

The Pennsylvania courts, however, have created an exception which is relevant here. Referred to as the discovery rule, this exception allows the running of the statute to begin at the time the plaintiff discovered or reasonably should have discovered the injury sued upon. The rule was defined by the Pennsylvania Supreme Court in *Ayers v. Morgan*, 397 Pa. 282, 154 A.2d 788 (1959):

4. Every suit hereafter brought to recover damage for injury wrongfully done to the person, in cases where the injury does not result in death, must be brought within two years from the time when the injury was done and not afterward.

> The injury is done when the act heralding a possible tort inflicts a damage which is physically objective and ascertainable.

397 Pa. at 290.

Although the trial court correctly applied Pennsylvania law as to which statute of limitations applied, it exceeded the dictates of federal court jurisdiction by instructing the jury to consider an alleged mental disability on the part of a plaintiff in determining when the statute began to run.

It is well settled in Pennsyvlania that the statute of limitations is *not tolled* by the plaintiff's diminished mental capacities. *Walker v. Mummert*, 394 Pa. 146, 146 A.2d 289 (1958); *Van Colln v. Pennsylvania Railroad Company*, 367 Pa. 232, 80 A.2d 83 (1951); *Peterson v. Delaware River Ferry Company*, 190 Pa. 164, 42 A. 55 (1899). In fact, in his opinion below, Chief Judge Lord agreed that the *Walker, supra*, holding is a correct statement of law. 453 F. Supp. at 767. Accordingly, under the *Erie* interpretation of the Rules of Decision Act, the trial court is bound to apply *Walker v. Mummert, supra*, with regard to the statute of limitations.

It is submitted that jury interrogatory no. 9 (Footnote 3, *supra*) is directly contrary to the holding in *Walker*, in that it requires the jury to consider plaintiff's alleged mental incapacity in determining the statute of limitations.

That the framing of an interrogatory — indeed the decision whether or not to utilize the jury interrogatory — is a matter of federal procedure and therefore to be governed by federal law *i.e.* Federal Rules of Civil Procedure, is undisputed. The holding in *Hanna v. Plumer*, 380 U.S. 460 (1965) makes that clear. The jury interrogatory, however, by the very nature of its function, combines elements of both substance and procedure.

This type of interrogatory enables the court to put the issues clearly before the jury. It obviates the need for interpretation of jury findings and presents a clear answer to the questions the jury is requested to decide. As such it must be patently clear both as to the issue the jury is to decide and to the law which the jury must apply. The jury must, therefore, be guided by and be operating under the framework of the appropriate substantive law. That law, in the instant case, is the law of Pennsylvania.

The jury must look to the trial judge to advise them of the relevant law. Whether he does so in the form of direct instruction or through the framing of interrogatories, the judge is informing the jury of the law to be applied. The language utilized in the interrogatory establishes the boundaries and gives the guidelines with which the jury will answer the question posed. Even in determining the question of when the statute of limitations began to run, the jury must be aware of any extrinsic factor to be considered. In Pennsylvania, as discussed *supra*, mental incapacity is *not* to be considered. Nonetheless, the interrogatory in question directed the jury to consider that very factor. As a result, they found the cause not to be barred by the statute of limitations. This interrogatory, therefore, modified substantive rights, ar 1 as a result violated the Rules Enabling Act, and the cases interpreting it.

Such a procedure is also in direct conflict with the outcome-determinative test announced in *Guaranty Trust*.

To place before the jury an issue which is not a part of the applicable substantive law, through the device of a federal rule of civil procedure is to use a procedural device to modify the outcome of the case. It is in effect mandating an outcome different from that which would arise were the same issue before a state court. This is the very danger, which the outcome-determinative test sought to avoid. This Court in *Hanna*, citing *Guaranty Trust*, crystalized the ques-

tion to be considered under the outcome-determinative test:

> And so, the question is not whether a statute of limitations is deemed a matter of 'procedure' in some sense. The question is . . . does it significantly effect the result of a litigation for a federal court to disregard a law of the state that would be controlling in an action upon the same claim by the same parties in a state court?

380 U.S. at 466.

Herein, there is a significant effect on the result of the litigation—herein there is a conflict with *Guaranty*.

Aside from these conflicts with other decisions of this Court, there is serious harm to the orderly and consistent exercise of federal court jurisdiction in allowing the use of a procedural device to modify state substantive law.

These harms form the roots from which the *Erie* doctrine grew and developed:

> The *Erie* rule is rooted in part in a realization that it would be unfair for the character or result of a litigation materially to differ because the suit had been brought in a federal court.

Hanna v. Plumer, 380 U.S. at 467.

To enlarge the statute of limitations by requiring consideration of the mental disability in an interrogatory to the jury, mandates a different result in the federal court than in the state court.

This leads to another harm which the *Erie* line of cases sought to alleviate: That harm is forum shopping. If the decision below were permitted to stand, thereby allowing federal court juries to consider mental incapacity in determining the factual statute of limitation issue, plaintiffs with alleged incapacities whose tort claims would be barred in the Pennsylvania state court would invoke the jurisdiction of a federal court to give life to a dead claim. Plaintiffs whose claims could

be dismissed in the state court by summary judgment would now be able not only to proceed past the preliminary stages, but would get their causes, although barred in a state court, to the jury in a federal court. This would certainly encourage plaintiffs to bring cases in the federal courts. Defendants would then be compelled to challenge federal court jurisdiction and if not successful then be required to defend a cause barred by the state. The resulting burden on the effective administration of federal court jurisdiction is clear.

In *Erie*, the Court granted certiorari:

> Because of the importance of the question whether the Federal Court was free to disregard the alleged rule of the Pennsylvania Common Law.

Erie, supra, at 71.

In *Bernhardt v. Polygraphic*, 350 U.S. 198 (1955), this Court granted certiorari because of a "doubtful application by the Court of Appeals of *Erie*." 350 U.S. at 200.

Pennsylvania law has been disregarded under the guise of federal procedure. The Rules of Decision Act and cases interpreting it have been violated in a way which greatly threatens the orderly and consistent exercise of federal court jurisdiction. To correct these errors and to preclude the harm which would result, Petitioner prays that a Writ of Certiorari issue to review the decision of the Court of Appeals for the Third Circuit.

II. The ruling below violates the Rules of Decision Act and the cases interpreting it and enlarges the jurisdiction of a federal court in a diversity case beyond its legitimate limits.

In deciding *Bayless, supra*, relied on below, the Court of Appeals for the Third Circuit violated the principle of *Erie*, as well as the Rules of Decision Act in

that it extended the law of Pennsylvania in making both an unnecessary and an unwarranted prediction of Pennsylvania law.

When no state law exists on a particular question, the federal court is to ascertain what the law of the state would be were the state court faced with the same issue. For those purposes, the federal court is "in effect only another court of the state." *Angel v. Bullington*, 330 U.S. 183 (1947).

A determination of whether *Bayless* was a proper case for the Court of Appeals to predict Pennsylvania law, requires an examination of Pennsylvania law on the statute of limitations.

As discussed, earlier, *Ayers v. Morgan*, a Pennsylvania Supreme Court case, held that the statute of limitations begins to run when the injury is discovered or reasonably should have been discovered. The court in *Ayers* relied on two Pennsylvania Supreme Court cases: *Lewey v. Fricke*, 166 Pa. 536, 31 A.260 (1895) and *Scranton Gas and Water Company v. Iron and Coal Company*, 167 Pa. 136, 31 A.484 (1895). In *Lewey*, a property damage case, the Pennsylvania Supreme Court held:

> The Statute [of Limitations] runs against an injury committed in or to a lower stratum from the time of actual discovery, or the time when discovery was reasonably possible . . .

166 Pa. at 547.

> In *Scranton, supra*, the Court held that:
>
> When knowledge is impossible because of the laws of nature or because of the actual fraud of the wrongdoer, the statute runs from the time of discovery.

167 Pa. at 152. Quoted in *Ayers v. Morgan*, 397 Pa. at 287.

Certainly, as the court in *Ayers* pointed out, the plaintiff in a malpractice case, where non-external injuries are alleged, is as unaware of his injury as is the owner of sub-stratum property.

Neither *Lewey* nor *Scranton*, nor *Ayers*, made any requirement that plaintiff discover his injury as well as its cause for the statute to begin to run. In fact, the Pennsylvania courts have declared that plaintiff has an affirmative duty to use reasonable diligence to discover the cause of injury once he has discovered that there has been an injury. The two year statute of limitations enables him to pursue that investigation and determine who or what is the cause so suit might be properly and timely brought.

> . . . It is the duty of one asserting a cause of action against another to use all reasonable diligence to properly inform himself of the facts and circumstances upon which the right of recovery is based and to institute suit within the prescribed statutory period. . . . Mere mistake, misunderstanding or lack of knowledge is not sufficient to toll the running of the statute . . .
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> *Schaffer v. Larzelere*, 410 Pa. 402 at 405, 189 A.2d 266 (1963). *Accord, Armacost v. Winters*, ___ Pa. Superior Ct. ___, 392 A.2d 866 (1978).

It was a federal court which first added the requirement that plaintiff must discover not only his injury but also the cause of that injury. In *Gemignani v. Philadelphia National League Baseball Club*, 287 F. Supp. 465 (E.D.Pa. 1967) the court denied defendant's Motion for Summary Judgment on the statute of limitations. Recognizing that the Pennsylvania courts had required only discovery of facts (i.e. — injury) the court nonetheless added the discovery of the cause requirement. The court based its reasoning on the fact that knowledge of the injury in *Ayers* occurred simultaneously with discovery of the cause. That fortuitous occurrence, it is submitted, does not give rise to an opportunity for a federal court to alter the law of Pennsylvania.

To hold that discovery is required of both the injury and the cause, is to require knowledge of the tort itself, since a tort is primarily comprised of an injury and a causal relationship. Discovery of the tort is not required in Pennsylvania:

> Thus, according to the Pennsylvania courts the statute runs when the injury or cause of harm is discovered or reasonably discoverable, *not the tort itself*, in the absence of fraud or concealment. (emphasis added)

Huber v. McElwee-Courbis Construction Co., 329 F. Supp. 1379 at 1383 (E.D.Pa. 1974).

However, in 1974, a Pennsylvania court still held in accordance with the *Ayers* rule that in medical malpractice cases, knowledge of the cause of the injury is not required under Pennsylvania law:

> Other cases [*Byers v. Bacon*, 250 Pa. 564 (1915)]; [*Ayers v. Morgan*, 397 Pa. 282 (1959)] have to do with medical malpractice situations, wherein a sponge was left in plaintiff 's body. Those cases speak in terms of plaintiff discovering the *fact of the injury* within the proper time, not the *cause* of the injury. (emphasis in original)
>
> *Aguado v. Koutsoubos*, 68 Pa. D&C.2d 727 at 730 (Del. Co. Com. Pl. 1974).

The federal court returned to the *Ayers v. Morgan* ruling (discovery of the injury) in *Huber v. McElwee-Courbis Construction Company*, when the late Judge Gorbey stated with reference to whether the plaintiff must be aware that a tort has occurred in order for the limitations period to commence to run, that:

> In holding that the Pennsylvania statute of limitations runs from the reasonable discovery of the injury or cause of harm the Pennsylvania courts have stretched the statutory language to its limits. To go further and follow the language of my brothers on the federal bench and hold that the statute runs from the date of the reasonable discovery of 'defendant's culpability' would violate the spirit of Erie . . . and would invade the province of the Pennsylvania legislature and courts (which have never employed the standard — discovery of defendant's culpability — in construing the statute of limitations). . . . (W)e see *no* reason to hold that until plaintiff discovers or reasonably should discover the ultimate and detailed facts concerning defendant's culpability, the statute will not run. . . . (emphasis added)

392 F. Supp. at 1383 and n.3. *Accord, Mitchell v. Hendricks*, 431 F. Supp. 1295 at 1300 (E.D.Pa. 1977).

In *Bayless, supra,* relied on below, the Court of Appeals for the Third Circuit revived the knowledge of the cause of injury requirement. In so doing, the court alleged that this was an "accurate prediction of what a Pennsylvania Court would hold in like circumstances." *Greenberg v. McCabe*, Opinion Sur Denial of the Petition for Rehearing, p. 3, footnote 1 (App. C).

Petitioner contends that no prediction was required since as discussed *supra*, there is Pennsylvania law on the subject of when the statute of limitations commences to run in a medical malpractice case where the injury is not immediately ascertainable.

Petitioner further maintains that to grant a plaintiff two years from the time he discovers the injury and knows its cause, is to remove totally from the statute of limitations any purpose or effect.

It is precisely the purpose of a statute of limitations to give a potential plaintiff time to investigate the injury and determine its cause. It is within this time he must establish the causal link, ascertain the defendant's culpability and initiate the cause of action. This is the very reason for the discovery rule in malpractice cases.

In its Opinion Sur Denial of the Petition for Rehear-

ing, at footnote 2, the Court of Appeals maintains that *Armacost* "appear(s) to bear out this court's prediction in *Bayless*." Such an interpretation is inconsistent with the holding in *Armacost* as well as contrary to the purpose of the two year statute of limitation as discussed, *supra*. *Armacost* held that the plaintiff's suit was barred because plaintiff could have reasonably discovered the cause of injury within two years of discovery of the injury and brought the appropriate action. This is a clear statement by a Pennsylvania court that this is the reason for the two year statute.

To mandate that the statute must commence to run when plaintiff knows of the injury *and* its cause is to equate the knowledge necessary to start the statute running with the knowledge necessary to actually institute the cause of action. The Pennsylvania legislature could not have conceivably intended to give the plaintiffs who knew all requirements to bring a cause of action two more years within which to do so. To hold that the statute does not begin to run until the plaintiff has discovered his injury and its cause is to allow a plaintiff with a complaint in hand, two years to ascend the steps of the courthouse. To so hold is to strike the statute of limitations from the list of available affirmative defenses.

The Supreme Court of Pennsylvania has admonished that the legislative policy underlying the two year personal injury statute of limitations is not to be lightly disregarded:

> The defense of the statute of limitations is not a technical defense but substantial and meritorious . . . Such statutes are not only statutes of repose, but they supply the place of evidence lost or impaired by lapse of time, by raising a presumption, which renders proof unnecessary. . . . Statutes of limitation are vital to the welfare of society and are favored in the law. They are found and approved in all systems of enlightened jurisprudence. They promote repose by giving security and stability to human affairs. An important public policy is at their foundation. They stimulate to activity and punish negligence. . . .

Schmucker v. Naugle, 426 Pa. 203 at 205-206, 231 A.2d 121 (1967).

The holding in *Bayless* as applied to the instant case has removed the effect of the statute of limitations. In so doing, the Court of Appeals for the Third Circuit has violated the *Erie* doctrine and created new law in Pennsylvania.

To permit the federal court to establish its own statute of limitations for diversity cases violates the dictates of *Guaranty v. York*, which held that a federal court in a diversity case must apply the state statute of limitations. A different statute of limitations in state and federal courts would result in varying adjudications depending on the forum a plaintiff chose. This is one of the precise harms *Erie* sought to avoid.[5] It would also greatly encourage plaintiffs to bring causes in the federal court and thereby foster forum shopping.

Petitioner prays that this Court issue a Writ of Certiorari to correct the *Erie* violation and restore the proper relationship between the exercise of federal and state jurisdiction.

CONCLUSION

The reasons assigned by the Petitioner for the granting of the writ encompass important considerations for the federal judiciary. If a rule of civil procedure properly enacted by this Court can be used to modify the well-established choice of law doctrines, uncertainty will become the watchword for the substantive law in federal courts. Plaintiffs will rush to the federal court with causes which should be heard in state court,

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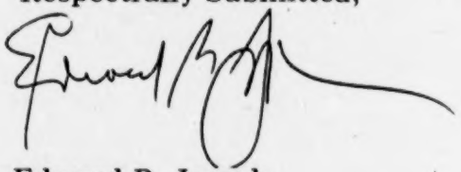
5. See discussion in reason I, above.

so as to have a "better" substantive law applied. In a case where federal procedure would contravene state law to the benefit of the defendants, the clerk's office will be flooded with removal petitions. Only this Court can alleviate these potential dangers by granting the writ of certiorari and by containing the use of Rule 49 within the bounds of procedure and not permit its use to override state substantive law.

The writ should also issue to preclude the court of appeals from predicting state law in the absence of any need to do so. Where no prediction is needed, prediction is tantamount to legislation. The writ of certiorari would restrain such prediction and restore balance to the exercise of federal court jurisdiction. That balance is an essential one for it governs the relationship between federal and state courts and forms the cornerstone for our federalism.

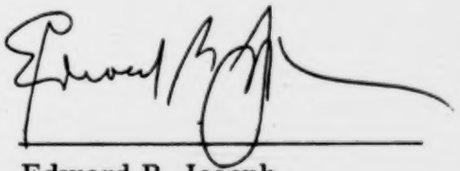
Respectfully Submitted,



Edward B. Joseph
Fredric L. Goldfein
Attorneys for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of June, 1979, three true and correct copies of the Petition for A Writ of Certiorari were personally served on James Edwin Beasley, Esquire, 21 S. 12th Street, 5th Floor, Philadelphia, Pa. 19107. I further certify that all parties required to be served have been served.



Edward B. Joseph
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APPENDIX A

(Filed June 16, 1978)

OPINION

JOSEPH S. LORD, III, Chief Judge.

Plaintiff in this psychiatric malpractice case alleges that defendant negligently treated her, principally by engaging in a sexual relationship with her in the course of therapy and by improperly administering drugs, from June 1968 through February 1974 and that she sustained permanent psychiatric damages as a result of this negligence. The jury returned a verdict for the plaintiff in the amount of $665,000: $275,000 for compensatory damages exclusive of costs for future psychiatric care, $90,000 for future psychiatric care and $300,000 for punitive damages. We will address at some length two of the points raised by defendant in his motion for judgment notwithstanding the verdict or for a new trial: that plaintiff's claim is barred as a matter of law by the Pennsylvania statute of limitations and that the record does not support the award for future psychiatric treatment.

I. Statute Of Limitations:

Plaintiff filed this suit on January 5, 1976, and there is no dispute that Pennsylvania's two-year statute of limitations for personal injuries applies. Defendant contends that as a matter of law the statute began to run before January 5, 1974, that the statute was not tolled and that plaintiff's claim is therefore barred. Defendant's position admixes two separate arguments, that our instructions to the jury were based on an erroneous interpretation of Pennsylvania law and that the jury, if properly instructed, could not reasonably have found that the statute of limitations did not bar the claim. We will consider these contentions separately.

A. What Plaintiff "Should Have Known".

[1] The Pennsylvania statute provides that personal injury suits must be brought "within two years from the time when the injury was done and not afterwards." 12 Pa.Stat.Ann. §34. While the general rule in Pennsylvania is that the statute begins to run when the final event creating the cause of action occurs. Pennsylvania law recognizes exceptions to that doctrine in several factual situations; in malpractice cases the running of the statute depends on the plaintiff's discovery of his or her injury and its cause. The defendant contended at trial and argues in this motion that knowledge of the injury alone is sufficient to commence the statutory period. We determined that under Pennsylvania law malpractice suits must be filed within two years after the plaintiff knew or in the exercise of reasonable diligence should have known that the defendant's conduct was causing her harm, and we instructed the jury accordingly. The issue of what a plaintiff must discover actually or constructively has not been resolved by the Pennsylvania Supreme Court. That court's leading case on the statute of limitations, *Ayers v. Morgan*, 397 Pa. 282, 154 A.2d 788 (1959), is ambiguous as to whether knowledge of the cause of harm is required. The Third Circuit has answered this question for us, however, in *Bayless v. Philadelphia National League Club*, 579 F.2d 37 (3d Cir. 1978), where it held on the basis of the "common sense and reason" rationale in the *Ayers* analysis that "the rule in Pennsylvania is that the limitations period begins to run from the time that the plaintiff knows or reasonably should know the cause of his injury." 579 F.2d at p. 39.

B. Jury's Consideration of Plaintiff's Drugged Condition in Ascertaining Time of Reasonable Discovery.

We charged the jury that if it found the plaintiff "was wrongfully under the influence of drugs" it should consider "what a person in her condition would be expected to do and to know" in ascertaining when the statute of limitations began to run and whether the plaintiff was contributorily negligent. N.T. 7-31. Furthermore, the interrogatory to the jury on the issue of the statute of limitations read, "Do you find that a person in Mrs. Greenberg's mental and physical condition (as you find it to have been) knew or should have known before January 5, 1974, that she was suffering harm as a result of defendant's conduct?" Defendant contends that the instruction and the interrogatory were in error in that they allowed the jury to consider the drug-induced impairments to the plaintiff's reasoning process in determining when she should have known of her injury and defendant's causal relationship to it. Defendant's argument that the instruction was in error mistakenly relies upon two related lines of authority and misses the narrow point of law upon which the instruction and interrogatory were based.

[2] First, defendant contends quite correctly that the statute of limitations cannot be tolled by the plaintiff's diminished mental capacities. *Walker v. Mummert*, 394 Pa. 146, 146 A.2d 289 (1958). Certainly, to the extent that a drug-induced impairment or incapacity constitutes a mental condition, it does not as a general matter toll the statute. *Bayless v. Philadelphia National League Club*, C.A. No. 76-3221 (E.D.Pa. June 21, 1977), *rev'd on other grounds*, 579 F.2d 37 (3d Cir. 1978). Defendant's argument misses the point, however, in that it confuses the extraordinary equitable provision of tolling with the scope of circumstances which may be considered in the usual inquiry into

when the plaintiff discovered or should have discovered her injury and its cause. Tolling stops the statute from running, even if it has started, on the basis of a single factual finding, an under Pennsylvania law mental incapacity is not a factual basis sufficient for tolling the statute. Our charge to the jury, on the other hand, was based on the reasoning that the plaintiff's mental condition, regardless of whether it amounted to incapacity, is among the many factors which can be weighed by the fact-finder in determining the time of discovery, insofar as that condition was caused by the defendant.

[3-5] The defendant contends further that permitting the jury to consider the plaintiff's drugged state is improper in that she was bound as a matter of law to employ "objective reasonable diligence" in discovery of her injury and cause. Defendant's Brief at 26. We conclude to the contrary that under Pennsylvania law she should not be held to the standard of one whose mental capacities were not reduced by the defendant's conduct. The language employed by the Pennsylvania courts in describing the duty of a plaintiff to discover "by the exercise of reasonable diligence," *Ayers v. Morgan*, 397 Pa. at 292, 154 A.2d at 793, suggests that the relevant standard is that of the reasonable man as it recurs throughout tort law. The general rule is that in determining the reasonableness of a person's conduct, his or her illness or physical disability can be considered in defining the standard which he or she must meet, but that a mental deficiency cannot be taken into account. *Restatement (Second) of Torts* §§ 283 B, 283C (1965). *Accord*, W. Prosser, The Law of Torts §32, at 151-54 (1971). It would have been error, consequently, to instruct the jury that they could consider Mrs. Greenberg's level of intelligence or other mental characteristics generally in determining when she should have arrived at discovery in the exercise of reasonable diligence.

That was, however, neither the legal theory nor the practical effect of the challenged instruction and interrogatory. Rather, they were aimed at permitting the jury to take into account mental disabilities caused by the drugs which were prescribed and/or administered to the plaintiff by the defendant as part of the therapy which plaintiff proved was negligent. There was no evidence presented that plaintiff 's judgment and capabilities were impaired by drug-taking in which the defendant was not involved. Even the interrogatory to the jury, bringing into play the plaintiff's "mental . . . condition", could have referred in this record only to mental disabilities incurred by the plaintiff as a result of the defendant's treatment. We observed in formulating the charge, "There is nothing in the record to show that her judgment was impaired by anything other than this," and the defendant acquiesced in that assessment. N.T. 6-63.

While we know of no Pennsyvlania authority directly on point,[1] logic compels the conclusion that it was proper for the jury to consider the plaintiff 's mental disabilities insofar as they were caused by the defendant. Our determination is based in part on our understanding of the rationale for the discovery rule in

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1. Defendant cites the district court opinion in *Bayless v. Philadelphia National League Club* for the proposition that his contribution to the plaintiff's drugged condition does not warrant its consideration by the jury in determining the time of reasonable discovery. The facts of *Bayless*, in which a baseball player alleged that he was injured by, *inter alia*, improper administration of drugs by his employer team, are essentially on point. The argument advanced by the plaintiff and rejected by the court there, however, was that his incapacity caused by the drugs should *toll* the running of the statutory period. As we have noted, our case involves not tolling by reason of incapacity, but rather mental condition as a factor to be determined in discovery. To the extent that the granting of defendant's motion for summary judgment on the ground that the statute had run in *Bayless* is inconsistent with allowing a drugged state induced by defendant to be a factor in discovery, we respectfully disagree with that opinion.

Ayers v. Morgan. The Supreme Court reasoned that *Ayers'* claim could not be barred because the defendant's conduct set in motion objective "laws of nature" which prevented Mr. Ayers from ascertaining the cause of his abdominal pain: since defendant had sewn him up as part of the treatment, "he could not open his abdomen like a door and look in" to discover the cause of his pain. 397 Pa. at 289, 154 A.2d at 792. Similarly , in this case the testimony of the pyschiatrist called by plaintiff as an expert established that as a matter of scientific fact the defendant's therapy impaired the judgment and mental processes of Mrs. Greenberg in a way that was analogous to, if subtler than, the surgeon's sewing up of Mr. Ayers' abdomen. Thus, the plaintiff presented competent and unrebutted testimony that as a result of the operation of the "laws of nature" in connection with Dr. McCabe's treatment, which laws we understand to comprise the psychiatric as well as the physiological, she was precluded from discovery. At issue is the objective effect of the defendant's treatment on discoverability by a reasonable person, not the impact on discoverability of the plaintiff's mental deficiencies apart from that treatment.[2] On this basis, we conclude that the instruction and interrogatory accurately reflected Pennsylvania law.

[6] We wish to emphasize the narrowness of the doctrine by which the plaintiff s mental condition may be considered by the fact-finder in determining when he or she reasonably should have known of an injury and cause thereof. It does not mean that a plaintiff may offer slow-wittedness, idiosyncratic weaknesses of reasoning or lack of legal sophistication to excuse a failure to discover. Thus we do not mean to suggest that a

2. Since there was no evidence at trial of any significant mental deficiencies of the plaintiff other than those produced by Dr. McCabe's therapy, any "influence of drugs" or "mental condition" which may have affected the plaintiff was coterminous with the "laws of nature" arising from the treatment that may have impeded her judgment.

defendant can be deprived of the important protections provided by the statutes of limitations, see *Schmucker v. Naugle*, 426 Pa. 203, 205-206, 231 A.2d 121, 123 (1967), *quoting United States v. Oregon Lumber Co.*, 260 U.S. 290, 299-300, 43 S.Ct. 100, 67 L.Ed. 261 (1922), because he or she has the misfortune to harm a plaintiff who is not mentally capable of bringing the action within the statutory period. Rather, we mean to say that the statutory period does not begin to run if the fact-finder concludes that the plaintiff's failure of discovery, objectively determined, is brought about by the very nature of the defendant's conduct.

Our holding might be conceptualized in other ways. Defendant might be deemed to be estopped from being advantaged by considering the running of the statute on the basis of a state of objective reasonableness when his actions have precluded the plaintiff from attaining that state. Alternatively, the mental conditions of which plaintiff was not possessed at the time of the allegedly negligent conduct and which resulted from that conduct might be considered part of the external "circumstances" under which the reasonableness of a plaintiff's diligence in ascertaining discovery, like the reasonableness of of an actor's conduct which is alleged to be negligent, must be assessed. *See Mogren v. Gadonas*, 358 Pa. 507, 510, 58 A.2d 150, 152 (1948); *Restatement (Second) of Torts* §283 (1965). The conceptual approach reflected in our instructions to the jury was no more correct, but we think it was preferable under these facts in the relative clarity and freedom from legal theory and jargon of those instructions.

C. Date of Plaintiff 's Constructive Discovery.

[7, 8] We must now apply this legal standard to the record in the case. Defendant contends that, based on that record, the statute of limitations began as a matter of law to run either in 1968, when the therapy began, or

in 1972, when the plaintiff was hospitalized for psychiatric treatment. The dispositive issue is whether we should have directed a verdict for defendant at the end of the trial on the ground that the defendant had presented facts establishing that the statute of limitations had begun to run by January 5, 1974, and that plaintiff had not presented enough evidence to demonstrate the contrary to take the case to the jury. Only if such a directed verdict would have been proper can we grant the motion for judgment notwithstanding the verdict. *Neville Chemical Co. v. Union Carbide Corp.*, 422 F.2d 1205, 1210 (3d Cir.), *cert. denied*, 400 U.S. 826, 91 S.Ct. 51, 27 L.Ed.2d 55 (1970). We must determine whether, reviewing the record and giving the plaintiff the benefit of all reasonable inferences, we find a sufficient basis for the jury's conclusion that the plaintiff neither knew nor should have known that she had been injured by the defendant as of January 5, 1974. We conclude that plaintiff did present sufficient facts to provide such a basis.

[9] Plaintiff presented proof that she has suffered permanent psychosis and minimal to moderate organic brain damage as a result of defendant's negligent treatment. N.T. 5-97, 5-98, 5-67, 5-68. We conclude that as a matter of law plaintiff knew at some time before January 5, 1974, that she was suffering from mental illness of some sort. Under the facts of this case, however, this conclusion does not amount to a reliable indicium of plaintiff 's discovery. Since she had some mild neurosis when she first went to the defendant, knowledge of that mental disability certainly would not amount to discovery that would begin the statutory period. Under these circumstances, there is no reason to engage in separate inquiries as to when plaintiff learned of her condition and when she learned that defendant's conduct caused it. The dispositive issue is whether plaintiff as a matter of law knew or should have known on or before January 5, 1974, of

deterioration in her mental condition that was caused by the defendant's conduct, in light of all the circumstances (including the mental state she was in as a result of Dr. McCabe's conduct).[3]

The plaintiff sought treatment from the defendant in June 1968, when she was suffering from asthma as a result of the mild neurotic condition known as the "harried-housewife syndrome." N.T. 5-75. Dr. McCabe told the plaintiff during that visit that she had a lot of sexual hangups, and he prescribed therapy twice a week. Within six months of the beginning of therapy, the defendant had a sexual encounter with the plaintiff on the therapy couch, and a continuing sexual relationship as well as therapy transpired between them. The defendant contends that because the plaintiff testified the he told her in 1968 that it was wrong for them to have a sexual relationship, N.T. 4-90, the plaintiff had constructive notice as of that date of the defendant's improper treatment.

For several reasons we are unable to hold as a matter of law that the plaintiff knew or should have known in 1968 the elements requisite to starting the statutory period. First, the jury might well have concluded that the defendant's statement that the sexual relationship was wrong reflected his feeling that sex between him and the plaintiff was improper or immoral, rather than his opinion that it was improper psychiatric care, and that it was reasonable for plaintiff not to infer that the treatment was damaging her. Second, while the defendant told the plaintiff that a sexual relationship was "wrong", he also told her that that relationship would aid in her therapy. N.T. 4-91. The latter assurance is totally inconsistent with notice by the defendant of bad

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3. Defendant contends correctly that the actual or constructive discovery which begins the statutory period need not be of the full extent of her injury by the defendant. *Ayers v. Morgan*, 397 Pa. at 290, 154 A.2d 788. Knowledge of any mental harm caused by defendant would be sufficient.

therapy, but is compatible with his relating a negative moral judgment.

These assurances could have been considered by the jury in determining the plaintiff 's state of actual or constructive knowledge in 1968 and would support a conclusion that the defendant's statement that sex was wrong did not put the plaintiff in a position where she knew or should have known of her condition and his relation to it. Finally, the jury reasonably could have concluded that, even though the plaintiff knew at some time before 1974 that she was suffering from mental illness and that the defendant's treatment of her was medically improper, she had no reason to know of the causal connection between that malpractice and her condition. The defendant told her when they first met, before he began the therapy, that she was "very, very ill", N.T. 4-7, and she had insufficient notice in 1968 that any psychological problems she had were the result of the defendant's treatment for us to hold as a matter of law that she should have known of that casual relationship.

Defendant contends alternatively that, if the statute did not begin to run in 1968, it commenced as a matter of law in March 1972, when the plaintiff was admitted to the Harrisburg Polyclinic Hospital for psychiatric treatment and drug detoxification. Again, it is clear that plaintiff was aware at this time that she was suffering from mental illness. We are again unable to say as a matter of law, however, that the plaintiff knew or should have known that her psychiatric problems had been caused by any act of the defendant. The argument that the statute began to run in 1972 appears to be based on the severity of the plaintiff 's mental problems when she was hospitalized in March. *See* Defendant's Brief at 16.

The factors which defendant argues should have linked those injuries with the defendant's conduct in plaintiff's mind are the plaintiff's treatment by two

other psychiatrists in 1972 and afterwards, and her information from them that her sexual relationship with Dr. McCabe was wrong. But the defendant did not demonstrate that either of these doctors advised the plaintiff that the defendant's therapy was psychiatrically improper or had damaged her, N.T. 4-93, 4-96, 4-98, and in fact the doctor who treated her at Harrisburg Polyclinic Hospital testified that had the plaintiff asked him directly for his opinion as to her relationship and therapy with Dr. McCabe he would have "hedged on" the answer and would not have told her outright that it was damaging her. N.T. 2-103. Furthermore, the plaintiff testified that she considered the defendant her therapist and that she "didn't listen to anybody" but him. N.T. 4-94.

The defendant also points toward the plaintiff 's consultation from 1970 to 1972 with an attorney relative to her obtaining a divorce and to her successful completion of a licensed practical nurse training program in 1973 as indicia of her actual or constructive knowledge of defendant's malpractice. While either of these events might support an inference that the plaintiff knew or should have known of her injuries caused by Dr. McCabe's therapy, they do not compel the conclusion that she was as a matter of law on notice of these facts.

In arriving at the conclusion both at trial and now that an issue of fact existed as to plaintiff's constructive knowlege as of January 5, 1974, we have considered an extensive and convoluted array of evidence which does not lend itself to ready summary. We do note, however, three factors which are significant in that analysis. First, we deem plaintiff 's mental condition from 1968 until 1974 significant under the facts of this case as well as legally relevant. The plaintiff testified that the defendant "became a God" to her and that she "was dependent on him," N.T. 4-19, and that she feared displeasing him and would not question the

therapy he prescribed. Her expert witness explained this dependence as a consequence of Dr. McCabe's mishandling of the psychoanalytic phenomenon known as transference. The jury certainly could have made a reasonable inference that the plaintiff's powers of judgment were impeded by Dr. McCabe's treatment and that she neither knew nor by objective standards could have known under those circumstances that the defendant's treatment of her was related to her psychological damages before 1974.

Second, we deem the reassurances of the defendant that the sexual relationship between plaintiff and defendant and the drugs he was administering were proper therapy as relevant to the issue of her discovery. While we need not reach plaintiff 's contention that the statute did not run as a matter of law on the basis of these facts, they do help to define what the reasonable plaintiff would have done. This conclusion is particularly appropriate when, as here, the plaintiff has laid a solid scientific foundation through expert testimony for the conclusion that the scientific "laws of nature" intensified the impact of the defendant's conduct on the plaintiff's ability to perceive the consequences of that conduct.

[10] Finally, we consider the continuing therapist-patient relationship between defendant and plaintiff, or more precisely the factual issue as to that relationship and plaintiff's strong evidence of it, until February 11, 1974, itself to be significant in determining her constructive knowledge *vel non* of his relationship to her injuries. As the defendant has pointed out, Pennsylvania does not have a "continuous treatment rule", tolling the statute of limitations in a malpractice case until the end of treatment by the defendant. *Cf. Borgia v. City of New York*, 12 N.Y.2d 151, 237 N.Y.S.2d 319, 187 N.E.2d 777 (1962). The ongoing treatment is, nevertheless, a factor which could be taken into consideration in determining what investigation of the defendant's conduct the reasonably diligent plaintiff would have made and what knowledge the reasonably diligent plaintiff would have had. *Tyminski v. United States*, 481 F.2d 257, 264-65 n. 5 (3d Cir. 1973).

The parties agree that the facts here differ significantly from those involved in most reported malpractice cases. These differences limit the utility of analogy to cases in which courts have held plaintiffs barred by the Pennsylvania statute as a matter of law. We do note, however, that such determinations have been based on actual or constructive notice that was unambiguous on the record, and that in most cases the injury and cause thereof were either of the sort easily comprehended by a layman or were directly communicated to the plaintiff. *See Bayless v. Philadelphia National League Club*, C.A. No. 76-3221 (E.D.Pa. June 21, 1977), *rev'd on other grounds*, 579 F.2d 37 (3d Cir. 1978) (plaintiff on notice of alleged back injury on day of operation for that injury); *Huber v. McElwee-Courbis Construction Co.*, 392 F.Supp. 1379, 1383 (E.D.Pa.1974) (plaintiff on notice at time of accident of injuries resulting from explosion); *Carney v. Barnett*, 278 F.Supp. 572, 575 (E.D.Pa.1967) (plaintiff on notice as of date he was admitted to hospital for thallium poisoning where he then stated his belief that such poisoning was the cause of his illness, knew he was being treated for thallium poisoning and knew where he had obtained the thallium). In a case such as this, where the central factual inquiries concern the reasonableness of plaintiff 's ignorance and of her diligence under all the circumstances, and where the injury and cause thereof are subtler and more complicated than in the normal malpractice case, it seems particularly inappropriate to determine as a matter of law what the plaintiff should have known.[4]

4. Defendant has cited one case which he claims is precisely on point. In *Seymour v. Lofgreen*, 209 Kan. 72, 495 P.2d 969 (1972), the Supreme Court of Kansas upheld a trial court's dismiss-

II. Damages For Future Psychiatric Treatment:

[11] Plaintiff sought compensatory damages for future psychiatric treatment, and the jury awarded her $90,000 for such expenses. The defendant argues that that award was not supported by the evidence, and we agree that it was improper to submit this claim of damages to the jury.

[12, 13] Under the law of Pennsylvania, a plaintiff bears the burden of proof by the preponderance of evidence with regard to damages to be incurred in the future, *Wallace v. Pennsylvania Railroad Co.*, 222 Pa. 556, 561, 71 A. 1086, 1088 (1909); *Buccare v. Mennella*, 369 A.2d 806, 807 (Pa.Super. 1976). *See also Leizerowski v. Eastern Freightways, Inc.*, 514 F.2d 487, 490-91 (3d Cir. 1975). It follows that the mere

Note 4—(Continued)

al of the defendant doctor, based on that state's statute of limitations, for malpractice by misuse of the transference phenomenon and sexual assault during three years of treatment. Our case and *Seymour v. Lofgreen* have striking factual similarities, but they also have important differences. In the latter case, the court determined as a matter of law that the plaintiff had ascertained her injury by a date more than two years before the action was brought on the basis of her termination of a patient-physician relationship with the defendant and initiation of a new course of treatment. There is in our case at least a disputed issue as to whether the therapist-patient relationship terminated more than two years before the bringing of the action. In addition, the Kansas case was decided under the Kansas statute of limitations, which provides that the limitations period can begin running at the time of injury, the time of causation of substantial injury or the time when "the fact of injury becomes reasonably ascertainable to the injured party." Kan.Stat.Ann. §60-513(4) (1971 Supp.). The court found that the plaintiff 's "injuries alleged . . . were by their nature acute and easily ascertainable." 495 P.2d at 975. The corresponding inquiry under Pennsylvania law is directed toward the time plaintiff knew or should have known of the injury *and causation by defendant's conduct*. These facts were by no means easily ascertainable to one in plaintiff's condition, for which the defendant was responsible.

possibility of future damages is insufficient proof and that such damages cannot be presumed on the basis of injury itself. *Gordon v. Trovato*, 234 Pa.Super. 279, 286, 338 A.2d 653, 657 (1975).

The plaintiff must demonstrate, accordingly, the probability of all the elements which are necessary for the future expenses to be incurred—including the fact that the treatment will be preformed as well as the fact of the injury itself. We conclude as a matter of law that the plaintiff did not demonstrate that it was probable she would undergo future psychiatric care, based on her own testimony that she would not undergo therapy and could not trust another doctor (apparently meaning therapist). N.T. 4-43. The testimony of plaintiff 's expert supported the unlikelihood that she would undergo therapy in the future by describing the difficulties that would have to be overcome in order for her to submit to such treatment. N.T. 5-99, 5-100. There was no evidence concerning the likelihood of plaintiff submitting to another kind of psychiatric care.

The only evidence from which an inference that the plaintiff is likely to undergo therapy in the future conceivably could be drawn is two-fold: her testimony that she has been able to trust and talk freely to doctors, and her expert's statement that "I hope that I could prevail upon her to accept treatment eventually." N.T. 5-100. We find these evidentiary scraps insufficient to support a finding that the plaintiff was likely, by a preponderance of the evidence, to undergo future psychiatric care.[5] Plaintiff 's other contentions concerning the jury's award for future medical expenses, *e.g.*, that the award was reasonably calculated and that the parameters of future treatment necessary to arrive at the award were testified to sufficiently, are

5. This insufficiency would remain even if we were to discount, as the plaintiff urges us to do, the force of her testimony that she would not be treated by another psychiatrist as the decision of a psychotic mind, since plaintiff bears the burden of going forward with the evidence as to damages.

not relevant to our finding that the jury could not reasonably have concluded such future treatment was probable.

Because this element of damages should not have been submitted to the jury, we will reduce the plaintiff 's verdict by the $90,000 that was awarded her for future treatment.[6]

III. Conclusion:

The defendant raises in his motion various other grounds, ranging from the mundane (the impropriety of punitive damages, the excessiveness of the damage awards) to the creative (the erroneousness of sending certain documents which had been admitted into evidence out with the jury, the denial of permission for defendant's private counsel as well as counsel representing defendant's insurer to participate fully in the case). We will deny the defendant's motion for judgment notwithstanding the verdict or for a new trial on these grounds.

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6. Because we have concluded that the evidence did not warrant an award for these damages, we do not consider the effect of our instruction that the jury could award damages for future care if it felt she was "entitled to the opportunity" to such care. N.T. 7-17. Considered alone, this is a misstatement of Pennsylvania law; we need not decide whether it was error in the context of the entire charge to the jury or whether, if error, it was harmless in light of the rest of the instruction.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 78-2091 and 78-2092

GREENBERG, GALE, *Appellant* in No. 78-2091,

vs.

McCABE, DONALD LEE, D.O.

GREENBERG, GALE

vs.

McCABE, DONALD LEE, D.O.
Appellant in No. 78-2092

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Argued February 13, 1979

Before: ALDISERT, ADAMS and HIGGINBOTHAM,
Circuit Judges.

JUDGMENT ORDER

After consideration of all contentions raised by appellant and cross-appellant, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.
Each party to bear his or her own costs.

BY THE COURT,

/s/ ALDISERT
Circuit Judge

Attest:

/s/ THOMAS F. QUINN
Thomas F. Quinn, *Clerk*

Dated: February 27, 1979

Certified as a true copy and issued in lieu of a formal mandate on March 29, 1979.

Test:

Chief Deputy Clerk, U.S. Court of Appeals
for the Third Circuit

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 78-2092

GREENBERG, GALE

vs.

McCABE, DONALD LEE, D.O., *Appellant*

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

(D. C. Civil No. 76-0342)

Argued February 13, 1979

Before: ALDISERT, ADAMS and HIGGINBOTHAM,
Circuit Judges.

Affirmed by judgment order, Feburary 27, 1979
Petition for Rehearing Filed: March 12, 1979

PER CURIAM OPINION SUR DENIAL OF THE PETITION FOR REHEARING BEFORE THE ORIGINAL PANEL

Defendant-Cross-Appellant Dr. Donald McCabe appealed to this Court from an adverse judgment by

the district court for the Eastern District of Pennsylvania. A jury had found against Dr. McCabe in a medical malpractice suit and its award was upheld in most respects by the trial judge, whose opinion appears at 453 F.Supp. 765 (E.D. Pa. 1978). After hearing argument on behalf of defendant, and on behalf of plaintiff Gale Greenberg, who filed an appeal challenging that portion of the court's judgment reducing the verdict, we affirmed the trial judge's decision in all respects by a judgment order filed on February 27, 1979.

Dr. McCabe has now filed a petition asking the original panel to reconsider its order, again urging that the statute of limitations had run before plaintiff filed her suit on January 5, 1976. The facts are not in dispute and are fully stated in the district court opinion. From 1968 to February 1974, McCabe, an osteopathic physician who held himself out as a psychiatrist, systematically subjected plaintiff to medically unacceptable drug treatment and used his psychological hold over her to enter into a highly unethical sexual relationship with his patient. Plaintiff ultimately divorced her husband, cut herself off from her family and responsible medical advice, and "moved in" with defendant. She did not free herself of his influence until she was hospitalized in February, 1974. This suit was filed on January 5, 1976, within two years of her break with defendant.

Under Pennsylvania Law the Statute of limitations in a tort action is two years and begins to run when a plaintiff knows, or by the exercise of reasonable diligence should know, of the harm done him or her. *Ayers v. Morgan*, 397 Pa. 282, 154 A.2d 788 (1959). Recently, in *Bayless v. Philadelphia National League Club*, 579 F.2d 37 (3d Cir. 1978), this Court concluded that Pennsylvania would not begin its limitations period until a plaintiff knew or should have known not only of the harm but of its cause.[1] Defendant has consistently

1. In addition to his other contentions, Dr. McCabe asks this Court to reconsider *Bayless*, arguing that it is not in accord with

taken the position that plaintiff knew or should have known that he was the cause of her injury before January 5, 1974 — two years prior to the filing of this suit — and introduced evidence to support his argument. But what the plaintiff knew or should have known is a question of fact and was properly presented to the jury, which found against defendant in this regard.[2] Neither the district court nor this Court could conclude that this determination was clearly erroneous.

Dr. McCabe further argues tha the jury was improperly allowed to consider plaintiff 's diminished mental capacity in deciding when she became aware that she was suffering harm as a result of his conduct. It is well-settled Pennsylvania law that the statute of limitations is not tolled by a plaintiff's diminished mental capacities. *Walker v. Mummert*, 394 Pa. 148, 146 A.2d 2889 (1958). It is also agreed, however, that the statute "must be read in the light of reason and common sense. In its application to a given set of circumstances, it must not be made to produce something which the legislature, as a reasonably-minded body, could never have intended." *Ayers v. Morgan*, 397 Pa. 282, 154 A.2d 788, 789 (1959).

Note 1—(Continued)

Pennsylvania law. We decline to do this, both because the Internal Operating Procedures of this Court forbid the reconsideration of a prior decision unless the Court is sitting *en banc*, and because we believe, in any event, that *Bayless* is an accurate prediction of what a Pennsylvania court would hold in like circumstances.

2. Defendant has pointed out the recent Pennsylvania Superior Court decision, *Armacost v. Winters*, ___ Pa. Super. ___, 392 A.2d 866 (1978), decided after this case was briefed, suggesting that it is an important precedent in establishing when the statute of limitations should begin to run. In *Armacost*, however, a jury found against the plaintiff on when the cause of injury could have been ascertained. The jury here might have made a similar finding, but did not.

The opinion of the Superior Court, which accepts the importance of knowledge of the cause of an injury, would appear to bear out this Court's prediction in *Bayless*. *See* note 1 *supra*.

Under the circumstances presented by this case, where there is evidence that the defendant had complete psychological control over plaintiff until February, 1974 and that defendant through the use of drugs and other unconscionable forms of treatment throughout a six-year period rendered plaintiff incapable of normal perception and reasoning, ultimately doing her physical brain damage, we do not believe that a Pennsylvania court would forbid a jury's consideration of her mental state in evaluating her diligence in realizing the cause of her harm. On the contrary, given the findings of the jury, we are persuaded by the analysis of the district court that Pennsylvania law would not bar plaintiff under these circumstances. *See* 453 F.Supp. of 767-69.[3]

For these reasons, then, the petition for rehearing is denied.

TO THE CLERK:

Please file the foregoing per curiam opinion.

Dated: March 21, 1979

3. We note that the trial judge carefully considered the merits of Dr. McCabe's challenge to his instructions to the jury and we have affirmed his judgment. It should be added, however, that a serious question was raised about the adequacy of the defendant's objection to the charge on consideration of plaintiff's mental incapacity, and whether this ground for appeal was preserved. Reply Brief for Appellant and Brief for Cross-Appellee at 23-24 & n. 12. Inasmuch as we have affirmed the judgment of the district court in all respects, we have no occasion to rule on this particular question.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 78-2092

GREENBERG, GALE

vs.

McCABE, DONALD LEE, D.O., *Appellant*

SUR PETITION FOR REHEARING

Before the Original Panel

Present: ALDISERT, ADAMS and HIGGINBOTHAM, *Circuit Judges.*

The petition for rehearing before the original panel filed by

APPELLANT

in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who con-

curred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

BY THE COURT,

/s/ ALDISERT

Judge

Dated: March 21, 1979